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# Discovering the Right to Criminal Disclosure: Lessons from Civil Procedure

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# DISCOVERING THE RIGHT TO CRIMINAL DISCLOSURE

## Lessons from Civil Procedure

The amendments to the Criminal Procedure Code (Cap 68, 1985 Rev Ed) and subsequent case law developments have created a patchwork of rules governing the disclosure obligations of parties in criminal cases. This article argues that parties have thereby been endowed with a right that is exercisable in the courts to access the material to which the law says they are entitled. However, there are currently no proper procedural mechanisms in place for parties to make interlocutory applications to obtain such material. This article examines the competing values and ideals of a criminal discovery regime, and suggests that concepts such as further and better particulars and specific discovery can be adapted from the rules of civil procedure to create an overarching framework that can regulate applications to the court for access to materials prior to trial.

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## I. Introduction

1 On 2 January 2011, the amendments to the Criminal Procedure Code[1] ("CPC") came into force, and with it the advent of a regime of criminal discovery that, for the first time, required the Prosecution to disclose materials to the Defence prior to trial. Division 2 of Pt IX and Div 2 of Pt X of the CPC prescribe a structured and formal system of pre-trial discovery, known as criminal case disclosure ("the CCD regime"), that applies to cases in the High Court and a significant number of cases tried in the Subordinate Courts.

2 The documents that were identified as requiring exchange under the CCD regime were focused on those that would be used at trial.[2] The Court of Appeal supplemented this in the cases of

* The author is very grateful to Teo Guan Siew for his invaluable comments on this article. All errors remain the author's own.

1 Cap 68, 1985 Rev Ed.

2 See ss 162 and 165 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) in relation to District Court cases, and ss 176(4) and 195 in relation to High Court cases.

*Muhammad bin Kadar v Public Prosecutor*[3] ("the first *Kadar* judgment") and *Muhammad bin Kadar v Public Prosecutor*[4] ("the second *Kadar* judgment") (collectively referred to as "the *Kadar* judgments") by holding that the Prosecution owed an additional duty in common law to disclose certain types of material that would not be used at trial ("unused material").[5] More recently, the High Court granted a petition in *Li Weiming v Public Prosecutor*[6] for further particulars relating to the summary of facts provided by the Prosecution under the CCD regime.

3 This potent combination of legislative amendment and case law development has led to the emergence of a broad-ranging criminal discovery process that changes significantly the landscape of criminal litigation and practice. Discovery, in the context of criminal procedure, encompasses not just the exchange of documents *per se*, but of facts and information as well. We have truly, as one Member of Parliament put it, "moved out of the dark ages".[7]

4 This sea change is certainly to be welcomed. Yet, the developments have been somewhat piecemeal. The CCD regime focuses primarily on material that is to be used at trial, and as highlighted above, applies only to cases in the High Court and certain cases in the Subordinate Courts. The common law duty of disclosure as laid down in the *Kadar* judgments ("*Kadar* discovery"), on the other hand, applies to unused material and seems to apply to all cases.[8] Further, no link has yet been drawn between the discovery of documents and the discovery of facts and information in the form of particulars, as espoused by the court in *Li Weiming v Public Prosecutor*.[9] Perhaps because of its relative youth and immaturity, the criminal discovery landscape lacks an organised procedural framework.

5 The importance of having such a framework is not to be underestimated. Hitherto, the concept of pre-trial disclosure has been generally foreign to criminal litigation. It is therefore crucial for the courts to understand the procedural principles and rules that apply when hearing applications relating to these matters at the pre-trial stage. From the point of view of the parties, both the Prosecution and the Defence need to understand their obligations in order to understand

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3 [2011] 3 SLR 1205.

4 [2011] 4 SLR 791.

5 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [99]–[121].

6 [2013] 2 SLR 1227.

7 *Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 487 (Michael Palmer, Member of Parliament for Pasir Ris-Punggol).

8 The Court of Appeal contemplated the application of the common law duty of disclosure to cases that did not fall under the CCD regime: *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].

9 [2013] 2 SLR 1227.

how to fulfil them. They must also know what they are entitled to so that they can seek the court's assistance to obtain it from the other party. Further, from a broader perspective, it is important for the criminal legal system to have clear and precise bright line rules to govern the exchange of information and documents prior to trial as this promotes certainty and predictability not just for the court and the parties, but for future litigants and other users of the court system.

6 Bearing this in mind, this article seeks to build on the CCD regime and case law to construct a procedural scheme to regulate applications to the court for pre-trial disclosure. Central to this schematic is the idea that a *legal duty* has now been placed on the parties in respect of criminal disclosure.[10] At the same time, it is clear that the court has the *power* to compel parties in criminal proceedings to disclose documents.[11] The logical and jurisprudential corollary of this phenomenon is that the parties have a corresponding *legal right* to those documents, even though the legislation and case law have not articulated as such. Flowing from this, procedural mechanisms must be put in place at the pre-trial stage to give practical effect to the exercise of those rights and specifically to govern how parties can seek the material to which they are entitled from the courts. Such mechanisms must be calibrated to take into account the fact that the accused's right must be a qualified one as a balance has to be struck between the accused's rights to defend himself and the public interest in the effective prosecution of wrongdoers.

7 To this end, it is suggested that a page be borrowed from the developed system of civil procedure. The civil justice process has developed an intricate and comprehensive set of procedural rules to regulate interlocutory applications. In particular, it will be argued that the established mechanisms of further and better particulars[12] and specific discovery[13] in civil litigation can be transposed into the context of criminal procedure to regulate applications to the court for pre-trial disclosure in situations where documents or information to which a party is entitled has not been provided by the opposing party. It would, however, be inappropriate to import these procedural mechanisms in a wholesale fashion, as modifications are necessary to take into account the unique features of criminal law and litigation.

10 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 160–162; *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [110].

11 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 160–162; *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [111]–[112].

12 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 18 r 12.

13 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 24 r 5.

## II. Developments in criminal discovery: Surveying the landscape

### *A. The CCD regime*

8 It would be apposite to first catalogue the criminal discovery developments that have emerged thus far. Under the CCD regime, the court monitors the exchange of documents prior to trial through the mechanism of criminal case disclosure conferences ("CCDC").[14] It is first incumbent on the Prosecution to file and serve its Case for the Prosecution, which must contain:[15]

> (a) the charge which the Prosecution intends to proceed with at trial;
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> (b) a summary of facts in support of the charge;
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> (c) a list of the names of the witnesses for the Prosecution;
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> (d) a list of the exhibits that are intended by the Prosecution to be admitted at the trial; and
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> (e) any statement made by the accused at any time and recorded by an officer of a law enforcement agency under any law, which the Prosecution intends to adduce in evidence as part of the Case for the Prosecution.

9 Next, the Defence must file and serve the Case for the Defence, which must include:[16]

> (a) a summary of the accused's defence to the charge and the facts in support of the defence;
>
> (b) a list of the names of the witnesses for the Defence;
>
> (c) a list of the exhibits that are intended by the Defence to be admitted at the trial; and
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> (d) if objection is made to any issue of fact or law in relation to any matter contained in the Case for the Prosecution –
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> > (i) a statement of the nature of the objection;
> >
> > (ii) the issue of fact on which evidence will be produced; and
> >
> > (iii) the points of law in support of such objection.

14 See, generally, ss 160, 192 and 212 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

15 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 162 and 214.

16 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 165, 195 and 217.

10 Once the Case for the Defence has been served on the Prosecution, ss 166, 196 and 218 of the CPC prescribe that the Prosecution must within two weeks serve on the accused copies of:

> (a) all other statements given by the accused and recorded by an officer of a law enforcement agency under any law in relation to the charge or charges which the Prosecution intends to proceed with at the trial;
>
> (b) the documentary exhibits referred to in the Case for the Prosecution; and
>
> (c) the criminal records of the accused person, if any.

11 Two aspects of this scheme stand out. First, as one commentator has noted, the Prosecution is required to disclose all statements made by the accused in relation to the charge, while the accused is only required to disclose information beneficial and relevant to his case.[17] Second, other than the accused's statements, the documentary evidence to be disclosed is very much tied to the Prosecution's case. Unlike *Kadar* discovery, the CPC-mandated statutory regime does not require the exchange of "line of inquiry" documents.[18]

### *B. The* Kadar *judgments*

12 In *Muhammad bin Kadar v Public Prosecutor*,[19] two accused persons, one Muhammad bin Kadar ("Muhammad") and one Ismil bin Kadar ("Ismil") were charged with murder in the High Court. Ismil gave statements to the police in relation to the murder, in which he initially denied knowledge of the offence but later admitted murdering the victim on his own. Subsequently, Muhammad gave statements that both accused persons were at the scene of the crime. Ismil then made further statements to the effect that Muhammad was present at the crime but only assisted in robbery, and not the murder. Ismil subsequently filed a notice of alibi before the commencement of trial stating that he was home at the time of the murder.

13 During the trial, the Prosecution provided the Defence with a statement by the victim's husband, who was present at the scene of the crime. It transpired that the victim's husband had made three statements to the police stating that only one intruder was present.

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17 Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23 at 39.

18 See para 14 below.

19 [2011] 3 SLR 1205 and [2011] 4 SLR 791.

14 It was in the context of addressing the Prosecution's belated disclosure of the husband's statements that the Court of Appeal framed the Prosecution's common law duty to disclose unused material.[20] In so doing, the court provided some guidance on the nature and scope of that duty. The key principles can be summarised as follows:

(a) The discovery applies to unused material, that is, material that the Prosecution has in its possession but does not intend to use at trial.[21]

(b) Only those documents in the Prosecution's knowledge must be disclosed. The Prosecution is not required to search for additional material.[22]

(c) The Prosecution's obligation to disclose extends to:

(i) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and

(ii) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

15 In terms of timelines, the court tried to align the timing of the Prosecution's obligation with that of the CCD regime.[23] However, for cases where the CCD regime does not apply, disclosure should take place at the latest before the trial begins.[24]

16 The court expressly stated in the *Kadar* judgments that they were not attempting a comprehensive statement of the law in that area.[25] Indeed, because the court was entering uncharted waters, one would not expect the court to exhaustively cover all ground relating to the Prosecution's duty to disclose. Uncertainties remain as to whether the Defence can in the first place seek the documents to which it is entitled from the Prosecution, and if so, the appropriate process by which it should do so.

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20 In so doing, the court overruled *Selvarajan James v Public Prosecutor* [2000] 2 SLR(R) 946.

21 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [76].

22 *Muhammad bin Kadar v Public Prosecutor* [2011] 4 SLR 791 at [14].

23 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].

24 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].

25 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113]; *Muhammad bin Kadar v Public Prosecutor* [2011] 4 SLR 791 at [12] and [13].

### C. Li Weiming v Public Prosecutor

17 In *Li Weiming v Public Prosecutor*,[26] three petitioners took out criminal revision applications seeking a revision of orders made by the District Court. The petitioners faced one charge under s 477A read with s 109 of the Penal Code[27] and five charges under s 47(1)(*b*) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act.[28] Pursuant to the CCD regime, the Prosecution served the Case for the Prosecution, which consisted, *inter alia*, the relevant charges and a summary of facts. Each of the petitioners brought an application under s 162(*b*) read with s 169 of the CPC seeking either a discharge not amounting to an acquittal ("DNAQ") or an order for particulars. Each application was predicated upon the Prosecution's alleged failure to provide sufficient particulars in the summary of facts to fulfil the requirements of s 162 of the CPC.[29]

18 The District Court dismissed the applications, but acknowledged that the petitioners had raised valid issues that should be dealt with by the trial judge.[30] The petitioners then took out the revision applications, and Chao Hick Tin JA, sitting in the High Court, made an order for further particulars in relation to two out of three key areas that had been sought.

19 In coming to his decision, the judge highlighted that the summary of facts to be included in the Case for the Prosecution must have been for a purpose.[31] The court, therefore, could not treat the summary of facts in a manner which relegated it to redundancy.[32] Yet, the summary of facts should not be invested with a significance which oversteps the intentions of Parliament in introducing the CCD regime. A balance, therefore, had to be struck bearing in mind that the object of the CCD regime was to facilitate the trial such that the accused would know the case which he has to meet, and such that the Prosecution will not be caught off-guard by the Defence.[33] This decision, therefore, delineates the extent to which the summary of facts has to contain particulars in support of the charge.

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26 [2013] 2 SLR 1227.
27 Cap 224, 2008 Rev Ed.
28 Cap 65A, 2000 Rev Ed.
29 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [10].
30 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [11].
31 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [17].
32 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [20].
33 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [20].

## III. Understanding the right to criminal discovery

20 The objectives of the CCD regime were clearly articulated by the Minister for Law at the Second Reading[34] of the Criminal Procedure Code Bill 2010[35] and reiterated by the court in *Li Weiming v Public Prosecutor*.[36] The Minister highlighted that timely disclosure of information would help parties to prepare for trial and assess their cases more fully, and emphasised that the CCD regime introduced greater transparency and consistency to the pre-trial process.

### *A. The dual-faceted nature of criminal discovery*

21 From the survey of the discovery landscape set out in Part II above, it is clear that the objectives set out by the Minister are to be achieved by the pre-trial disclosure of two broad categories of materials: first, *facts and information* relating to the parties' respective cases; and second, *documents* (including statements) that are within the parties' knowledge. It is worthwhile examining these two types of disclosure in greater detail.

22 In respect of the disclosure of facts and information, the CPC and *Li Weiming v Public Prosecutor*[37] make clear that the Prosecution must disclose both the charges and the summary of facts, which must elaborate upon the charges in order that the accused will know the case he has to meet. The Defence, on the other hand, must disclose a summary of the defence to the charge and the facts in support of the defence. Further, if the Defence intends to object to any issue of fact or law in relation to the Case for the Prosecution, it must disclose a statement of the nature of the objection, the issue of fact on which evidence will be produced and the points of law in support of such objection.[38]

23 It would be immediately apparent to the civil litigation practitioner that, although the material set out above falls within the rubric of criminal discovery under the CCD regime, the facts and information that the parties are obliged to disclose can in fact be understood as the equivalent of pleadings in a civil case. In civil proceedings, pleadings, which contain the material facts of a case, are necessary to ensure that the issues in dispute between the parties are

34 *Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 407 (K Shanmugam, Minister for Law).
35 Bill 11 of 2010.
36 [2013] 2 SLR 1227 at [16].
37 [2013] 2 SLR 1227.
38 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 165, 195 and 217.

defined prior to trial.[39] The pleadings in a civil case also serve the function of framing the issues that the court is called upon to adjudicate, and it is generally the case that parties only carry out their discovery obligations after the close of pleadings.[40] The reason for this is that the scope of discovery in a civil case is defined by the issues in question in the action,[41] and these issues are crystallised in the pleadings. Further, in addition to the material facts, parties are required to plead sufficient particulars "to ensure clarity and precision of the issues, to avoid surprise at the trial and the expense of subsequent measures to remedy insufficiently particularised pleadings".[42]

24 These ideas are equally applicable in the context of criminal discovery and it is suggested that criminal discovery be understood in the following manner. The charges and summary of facts, which set out and define the Prosecution's case, broadly correspond to the statement of claim in civil proceedings. The charges and summary of facts must contain the necessary particulars in order for the Defence to understand the case that it has to meet, and the Prosecution would not be allowed to deviate from the charges and summary of facts during the trial. The summary of the defence to the charge and the objections made to any issue of fact or law in relation to any matter contained in the Case for the Prosecution would be the equivalent of the defence that is filed by the defendant in civil proceedings.

25 Crucially, it is suggested that the *documents* to be disclosed, whether under the CCD regime or in respect of unused material pursuant to the *Kadar* judgments, should also be determined by reference to the material facts as set out in the "pleadings", as defined above. This would ensure that discovery is relevant to and focused on the issues at trial, thereby preventing parties from going on a "fishing expedition"[43] in the hope of finding material in support of their case. It should also be noted that these principles apply with equal force to the Prosecution and the Defence, and both sides are equally obliged to provide the necessary particulars as required by the CCD regime.

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39 *Singapore Civil Procedure* vol I (GP Selvam ed) (Sweet & Maxwell, 2013) at para 18/0/2.

40 The pleadings in an action are generally deemed to be closed at the expiration of 14 days after the service of the last pleading (which is usually the reply): Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 18 r 20.

41 *Singapore Civil Procedure* vol I (GP Selvam ed) (Sweet & Maxwell, 2013) at para 24/1/7.

42 *Singapore Court Practice* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) at para 18/12/1.

43 The term is commonly used in civil procedure, see, for example, *Wright Norman v Oversea-Chinese Banking Corp Ltd* [1992] 2 SLR(R) 452 at [23] and *Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd* [2003] 1 SLR(R) 75 at [5] and [6].

26 With regard to the discovery of documents, the scope of disclosure is as set out in the CPC and the *Kadar* judgments.[44] To draw a parallel to civil procedure, these obligations would be the equivalent of a party's general discovery obligations under O 24 r 1 of the Rules of Court.[45] As has been suggested above, the scope of the documents to be disclosed (whether used or unused material) should be determined by reference to the charges and summary of facts for the Prosecution and the summary of defence for the Defence, just as the ambit of civil discovery is determined based on the issues as pleaded.

27 Hence, both the Prosecution and Defence are required to disclose documents under the CCD regime. Yet, it is clear from both the CPC and the *Kadar* judgments that despite the adversarial nature of criminal litigation, the discovery obligations of the parties in respect of documents are not evenly weighted. This is unlike the civil discovery process governed by O 24 of the Rules of Court.[46] Under the CPC, the Prosecution is obliged to provide all of the accused's statements and the documentary exhibits, while the Defence is only required to provide a list setting out the same without the need to produce the actual documents. Further, an accused person can opt out of the regime, but the Prosecution does not have the same luxury.[47] In a similar vein, the court in the first *Kadar* judgment recognised that while the duty of the Prosecution is to "assist the Court at all times before the conclusion of the trial, by drawing attention to any apparent errors or omissions of fact ... which in his opinion ought to be corrected",[48] the duty of the Defence takes a different form. While defence counsel cannot set up an a positive case inconsistent with any confession made by the client, they are not obliged to disclose evidence of the client's guilt, as those would be covered by privilege under the Evidence Act.[49] The Prosecution thus has a more onerous burden of disclosure than the Defence.

28 There are sound policy reasons for this inherently uneven playing field. In this connection, a comparison with civil procedure is again instructive. In civil proceedings, discovery is the process by means of which one party obtains documents and other information relevant to the case from another party in advance of trial.[50] The processes mandated by law are specifically designed to ensure that parties are able to successfully extract all relevant documents and other information from others and to thus find evidence supporting their own case and

44 See paras 12–16 above.
45 Cap 322, R 5, 2006 Rev Ed.
46 Cap 322, R 5, 2006 Rev Ed.
47 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 159(2).
48 Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) r 86.
49 Cap 97, 1997 Rev Ed. See *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [108].
50 Paul Matthews & Hodge M Malek, *Disclosure* (Sweet & Maxwell, 2007) at para 1.01.

undermining their opponent's. Other purposes of the disclosure process are to obtain the best evidence possible as well as to allow parties to evaluate the relative strengths and weaknesses of their case as well as that of their opponent's.[51] The removal of the element of surprise leads, in theory at least, to efficiency and savings of costs because parties may choose not to proceed with an action once they have a more complete understanding of the evidence against them.

29 While this rationale is equally applicable in the context of criminal discovery, further considerations exist in criminal proceedings that must be taken into account. For one, unlike in civil proceedings where parties enter into a dispute as equal players, the fundamental precept of the criminal justice system that every person is presumed innocent[52] by its very nature stacks the odds against the Prosecution, and the rules on burden and standard of proof best reflect this.[53] It is thus consistent with these basic tenets of our criminal justice system that the accompanying discovery regime behoves the Prosecution to "show hand" at an earlier stage of the proceedings, while allowing the Defence to keep its cards close to its chest until trial. Moreover, one must bear in mind that it is the Prosecution that works hand in hand with law enforcement agencies to obtain evidence against the accused person. Broadly speaking, the Prosecution can therefore be expected to have informational and tactical advantages over the Defence.[54] The criminal discovery process thus goes some way to re-calibrate this imbalance in favour of the accused.[55]

### *B. Discovery as a right*

30 The discourse on discovery has thus far been framed in the negative, in terms of the obligations of the parties and the power of the court to compel the discharge of such obligations, rather than in terms of the rights and entitlements of the parties. This mirrors the approach taken in the CPC, and in the *Kadar* judgments[56] as well as *Li Weiming v*

51 Paul Matthews & Hodge M Malek, *Disclosure* (Sweet & Maxwell, 2007) at para 1.02.

52 For a discussion on the principles underlying the criminal justice system, see the Law Minister's speech during the Second Reading of the Criminal Procedure Code Bill, *Singapore Parliamentary Debates, Official Report* (19 May 2010) vol 87 at cols 601–604 (K Shanmugam, Minister for Law).

53 For a discussion on the evidential rule of proving beyond reasonable doubt, see Chin Tet Yung, "Criminal Procedure Code 2010: Confessions and Statements by Accused Persons Revisited" (2012) 24 SAcLJ 60 at para 10.

54 Amarjeet Singh, "Equality of Arms – The Need for Prosecutorial Discovery" (September 2005) *Singapore Law Gazette.*

55 *R v McIlkenny* [1992] 2 All ER 417 at 426; Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23 at 36.

56 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205; [2011] 4 SLR 791.

*Public Prosecutor*.[57] For example, in the first *Kadar* judgment, besides prescribing a common law *duty* on the part of the Prosecution to disclose unused material, the Court of Appeal also used the first *Kadar* judgment[58] to overturn the High Court ruling in *Selvarajan James v Public Prosecutor*[59] that a court had no *power* to compel prosecutorial disclosure.[60] In so doing, the Court of Appeal held that any power necessary for enforcing the Prosecution's duty to disclose stemmed from the common law, more specifically the inherent power of the court to prevent injustice or the abuse of process. The court went further to add that such power to compel disclosure was vested in the trial court hearing the substantive matter, and not just the appellate court.

31 As can be seen, the court's discourse was not focused on articulating the issue from the point of the view of the rights of the parties, except to note that while the Prosecution's duty was owed to the *court*, this duty would be fulfilled by disclosure to the *Defence*.[61] However, what does this mean from the perspective of the accused? It is submitted that the necessary and logical corollary of the prosecutorial duty to disclose and the power of the court to compel such disclosure is that the accused person must have a *legal right* to seek such disclosure from the court where it is not forthcoming. Even if the Prosecution's duty is in strict terms owed to the court, the Defence is entitled to and can exercise the right to access the documents at the pre-trial stage. To do so, he must be able to seek the court's assistance to obtain these documents. Similarly, the disclosure obligations of the Defence can be framed in terms of the right of the Prosecution to utilise the court process to obtain the relevant information and documents from the Defence.

32 This practical analysis has jurisprudential support. American jurist Wesley Newcomb Hohfeld famously created an analytical framework for understanding the relationships between different forms of legal entitlements.[62] Under his juridical framework, every jural relation must be understood as a relationship between two persons. The jural correlative of a duty is a right, and person A, as part of a pair, cannot have a right against person B if person B has no duty in respect of person A. Applied in the current context, the jural correlative of the Prosecution's *duty* must be an *enforceable right* on the part of the Defence to obtain the documents that should be disclosed and to obtain

57 [2013] 2 SLR 1227.
58 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205.
59 [2000] 2 SLR(R) 946.
60 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [111] and [112].
61 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [118].
62 Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16 at 28–59.

an order from the court to compel such disclosure should it not be forthcoming (and *vice versa*).

33 As explained above, the nature of this right to discovery in criminal cases would be dual-faceted: it encompasses both the right to discover facts and information of the opposing party's case, as well as the right to discovery of relevant documentary evidence. In respect of the former, there is general parity in the terms of the rights of the Prosecution and the Defence, in the sense that either party is entitled to compel the provision of necessary and sufficient particulars so that the other party knows the case that he has to meet and the court is fully apprised of the issues upon which it has to adjudicate. The only difference would be as regards the timing of the exercise of those rights by the Prosecution and the Defence respectively, which is a necessary consequence of the sequential nature in the presentation of cases in an adversarial setting.

34 However, as regards disclosure of documents, it would appear that the rights are not evenly balanced, and it has been argued that this is justifiably so as a matter of policy. It follows that the focus of pre-trial disclosure here is primarily on how to give effect to the right of the accused to the necessary documentary evidence in preparation of his defence. This is not to relegate the right of the Prosecution to only secondary importance, but the emphasis on ensuring that the Defence has adequate recourse to documentary evidence in support of its case is a necessary and logical reflection of our system of criminal law which presumes the innocence of the accused and seeks to afford him a fair trial. Having said that, the right of the accused is necessarily a qualified one, as there are competing interests at stake. A proper conception of the rights of the Defence and the Prosecution to discovery would have to bear in mind the fine balance to be struck between fairness to the accused and effective prosecution.

## IV. Exercising the right to criminal discovery

### *A. The need for a procedural framework*

35 To give practical meaning and effect to the right to discovery in criminal proceedings, it is essential to construct an interlocutory framework that regulates the exercise of those rights via discovery applications to the court. The justifications for having such a framework were foreshadowed in *Li Weiming v Public Prosecutor*:[63]

63 [2013] 2 SLR 1227 at [28]–[29].

36 Second, the argument that any recourse for a lack of particulars should be deferred to the trial judge also detracts from the purpose of pre-trial criminal discovery. This is particularly so because the ability of the trial judge to draw adverse inferences will be frustrated or considerably hampered if the disclosed summary of facts is so bare that the Defence cannot contend that the Prosecution has done what s 169(1)(*c*) of the CPC 2010 proscribes, namely, put forward at the trial a case which "differs from or is otherwise inconsistent with" the Case for the Prosecution that was filed. It would be difficult, in these circumstances, to draw any adverse inference from an omission in the Case for the Prosecution. This will not be fair to the Defence. Moreover, the difficulty of drawing an adverse inference will effectively place the trial judge in the invidious position of having to choose between either the drastic option of ordering a DNAQ so as to hold the Prosecution to its discovery obligations, or making no order to penalise the Prosecution for non-compliance with the same. Should these be the only meaningful options available to the court, then curial supervision over the CCDC process would be rendered anaemic and the stated objective of greater transparency would be thwarted. In any event, it seems to me to be reasonable for a court which intends to order a DNAQ to offer the Prosecution a final opportunity to meet its discovery obligations. This would not be possible if s 169 is taken as exhaustive of all the remedies which a court can order for non-compliance with the CCDC regime.

37 If, as the Minister said, parties are to "take discovery seriously" (see [16] above), then the court must be involved at the preliminary stages to ensure that the CCDC regime is effective in helping parties to prepare for trial.

38 In essence, the court in the above passage recognised that in situations where a party did not comply with its discovery obligations, prejudice to the opposing party could occur well before trial, for instance, in terms of the party's inability to anticipate the case it has to meet or the evidence and factual allegations it has to rebut. Such prejudice would frequently not be of a nature that can be sufficiently rectified or remedied at trial. If the accused was handicapped in putting up an affirmative defence, or failed to call the appropriate witnesses or amass the relevant documentary evidence because he was not aware of sufficient details of the Prosecution's case, it is scarcely of any comfort to him to know that the court may be invited to draw an adverse inference against the Prosecution at trial. The problem lies not only with the lateness of any relief at trial, but also with the adequacy and proportionality of the possible remedial responses to the non-compliance. The court would be in a far better position to address the non-compliance at an interlocutory stage as it would be able to avail itself of a wider range of orders, rather than waiting until the trial when the available options at the court's disposal are not only limited but

likely to be disproportionate. The polar extremes, of a discharge on one end of the spectrum and the somewhat amorphous concept of drawing an adverse inference on the other, mean that any relief at the stage of trial would not be tailored to suit the nature, gravity and significance of the non-compliance and would be sorely deficient in giving meaningful effect to the rights to discovery. It is thus imperative that a pre-trial application procedure be put in place to facilitate the exercise of the respective parties' rights to discovery. Without a well-defined and established process for the seeking of such interlocutory relief, the objectives of the CCD regime, and criminal discovery more generally, cannot be achieved in practice.

39 In creating such an interlocutory framework for the exercise of the right to criminal discovery, we must take cognisance of the values and aims of the criminal litigation system. In particular, a balance must be struck between fairness to the accused person on one hand, and the need for effective prosecution on the other. Fairness to the accused would entail ensuring that the accused is adequately prepared for his defence, and it was indeed such concerns that were at play in the *Kadar* judgments,[64] as well as in *Li Weiming v Public Prosecutor*.[65] More fundamentally, the accused's interests are protected when he is given access to material which is favourable to him, and the architecture of the interlocutory framework must be tailored to achieve this.

40 On the other hand, there is a strong public interest in robust law enforcement and the effective prosecution of criminals. This equally valid and somewhat opposing ideal would militate against the creation of an excessively complex and layered interlocutory framework, for a few reasons. First, there is a need to avoid the possibility of overly onerous satellite litigation, which may distract the parties and prolong the resolution of the case. While the length of the trial process is less of a concern in civil proceedings, criminal matters generally affect the life or liberty of the accused person, and should therefore proceed with the utmost expedition. Second, an accused person has significant incentive to go on a fishing expedition and try his luck to see what he can obtain from the Prosecution. There is a distinct possibility that the time and resources of the Prosecution and the courts will be wasted on unmeritorious discovery applications. As such, the substantive tests to be applied by the court when adjudicating upon the interlocutory applications must be sufficiently robust to disincentivise such behaviour.

64 See, for example, *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [105].

65 [2013] 2 SLR 1227 at [20].

41 In summary, the applicable legal principles and the procedure to be adopted must attempt to reflect the delicate balance between various competing ideals. Sufficient checks and balances must therefore be built into the procedure and into the applicable legal principles in order to give effect to the right of both parties to disclosure, but to also reflect the fact that disclosure is only a qualified and not an absolute right.

### *B. Borrowing the framework from civil procedure*

42 It has been suggested above[66] that in understanding the nature of criminal discovery, a comparison with its civil counterpart is instructive; and that specifically, discovery of facts and information can be perceived as the broad equivalent of the obtaining of further and better particulars in relation to pleadings for civil cases, whereas the CCD regime and *Kadar* discovery correspond to discovery under O 24 of the Rules of Court.[67] Indeed, such links with civil procedure have already been drawn by the existing case law. As has been observed above,[68] the concept of particulars as conceived by *Li Weiming v Public Prosecutor*[69] has close parallels to the procedural rules and principles set out in O 18 of the Rules of Court.[70] In a similar vein, the "line of inquiry" test set out in the first *Kadar* judgment[71] is reminiscent of the well-known "train of inquiry" test in the context of civil discovery which is frequently traced back to the English decision of *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* ("*Peruvian Guano*").[72]

43 In conceiving the architectural framework for criminal discovery, it is submitted that we should therefore build upon such foundations and develop a formalised interlocutory procedure which parties can utilise to apply for further and better particulars in respect of the Case for the Prosecution and the Case for the Defence under the CCD regime. Similarly, an interlocutory procedure for applying for specific discovery should be introduced to allow parties to seek a court order in respect of documents to be provided under both the CCD regime and in respect of unused materials within the meaning of *Kadar* discovery.

66 See paras 20–34 above.
67 Cap 322, R 5, 2006 Rev Ed.
68 See paras 8–19 above.
69 [2013] 2 SLR 1227.
70 Cap 322, R 5, 2006 Rev Ed.
71 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205.
72 (1882) 11 QBD 55.

44 Both procedural mechanisms are well familiar to civil litigation practitioners and are tried and tested means by which particulars and documents can be sought using the court process. The rules of civil procedure have a long and cherished history, and have had sufficient time to develop complex and nuanced checks and balances to ensure that parties obtain the particulars and documents necessary to prepare for trial, while at the same time eliminating as far as possible unmeritorious applications. These established procedural mechanisms can be helpfully utilised in the context of criminal discovery, subject of course to necessary modifications that address various considerations highlighted above that pertain uniquely to the criminal litigation system.

### C. *The proposed regime: How, when and what material should be discovered*

#### (1) *Application for further and better particulars*

45 Beginning first with the proposal to institute interlocutory applications for further and better particulars, this section focuses on making suggestions as to *how* such applications should be taken out and the powers that the court should be given, *when* such applications should be taken out and *what* considerations the court should take into account in hearing such applications.

46 In respect of how such applications should be made, the mode of application is relatively straightforward: the established procedure frequently used for applications in criminal proceedings in the High Court, namely the criminal motion[73] supported by an affidavit justifying the application, should be formalised as the means by which parties seek further and better particulars in the criminal context. It is further suggested that this mode of procedure be statutorily extended to interlocutory applications made before the Subordinate Courts. The current practice in respect of such applications in the Subordinate Courts is inconsistent and could benefit from a formalised and clear pre-trial procedure. The criminal motion mechanism is well suited for this purpose.

47 The next question is the forum to which such an application ought to be made. There are various possibilities. Ideally, the trial judge should determine the merits of such applications, but given that the local court system does not generally practise docket case management (under which the trial judge is identified early to manage the case proceedings including the hearing of any pre-trial applications for

73 Criminal Procedure Code (Cap 68, 2012 Rev Ed) Pt XX, Div 5.

relief), this option does not appear feasible.[74] A more practicable option would be to have a group of judges or registrars dedicated to hearing such pre-trial applications in criminal proceedings. For High Court cases, a group of registrars could perform this role, which would be akin to the disposal of interlocutory applications in civil cases by Assistant Registrars in the Supreme Court Registry. In particular, the registrars who presently conduct committal hearings would be natural candidates.[75] In the context of the Subordinate Courts, a specific group of District Judges could be assigned to hear such pre-trial applications. Alternatively, since there is already in place a CCDC process administered by CCDC judges, these District Judges could hear such applications.

48 More importantly, it is crucial that the judge or registrar hearing such pre-trial applications in criminal proceedings be given the necessary powers to hear, dispose of and make meaningful orders in relation to the applications. Currently, the powers of the CCDC judge under the CPC have a fairly narrow scope, being generally limited to the giving of directions,[76] extensions of time[77] and the fixing of dates.[78] In order to effectively ensure compliance with any order made for particulars, the court hearing the pre-trial application for particulars should be given far more extensive powers, along the lines of the powers that the court has at pre-trial conferences in civil proceedings under O 34A r 1 of the Rules of Court.[79] Moreover, the orders that the court is

74 It should be noted that the High Court has recently moved to a modified docket system of litigation: Response by the Honourable the Chief Justice Sundaresh Menon at the Opening of Legal Year 2013 and Welcome Reference for the Chief Justice <http://app.supremecourt.gov.sg/data/doc/ManageHighlights/3686/CJ%20Speech%20OLY%20Welcome%20Reference.pdf> (accessed 6 May 2013).

75 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 192.

76 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 160, 192 and 212.

77 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 223.

78 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 167, 197 and 219.

79 Cap 322, R 5, 2006 Rev Ed. Order 34A r 1, Power to make orders and give directions for the just, expeditious and economical disposal of proceedings:

> (1) Notwithstanding anything in these Rules, the Court may, at any time after the commencement of any proceedings, of its own motion direct any party or parties to those proceedings to appear before it, in order that the Court may make such order or give such direction as it thinks fit, for the just, expeditious and economical disposal of the cause or matter.
>
> (1A) Where the Court makes orders or gives directions under paragraph (1), it may take into account whether or not a party has complied with any relevant pre-action protocol or practice direction for the time being issued by the Registrar.
>
> (2) Where any party fails to comply with any order made or direction given by the Court under paragraph (1), the Court may dismiss the action, strike out the defence or counterclaim or make such other order as it thinks fit.
>
> (3) The Court may, in exercising its powers under paragraph (1), make such order as to costs as it thinks fit.

(*cont'd on the next page*)

empowered to make should extend beyond merely case management-focused directions, to orders that can have a real impact on the substantive outcome of the case. As an example, if the court makes an order for particulars against the Prosecution, the court should be empowered to, in egregious cases of default by the Prosecution, make the further order that unless the order is complied with by a certain date, the consequence would be a discharge not amounting to an acquittal ("DNAQ"). While this may at first blush seem a drastic remedy (from the perspective of the Prosecution at any rate), it should be remembered that the order of DNAQ is already contemplated under the CCDC regime when there is non-compliance by the Prosecution in terms of its service of the Case for the Prosecution.[80] It therefore follows that a pre-trial court should similarly be given the specific power of ordering such a DNAQ when there is failure to comply with a court order for further and better particulars in respect of the Case for the Prosecution. Conversely, if an order is made against the Defence and there is persistent default on the part of the Defence to furnish the requisite particulars, orders with real sanctions that can crimp the running of the Defence must be at the disposal of the Court. Unlike in the case of a prosecution default, the CPC provisions are silent as to the consequence of a failure by the Defence of its CCDC obligations. This should not, however, restrict the court to merely the drawing of an adverse inference: more concrete and tangible sanctions could and ought to be made in appropriate cases. For instance, a blatant refusal to provide particulars of a material factual allegation in the Defence's case could attract an order from the court that precludes the Defence from relying on and calling evidence to support that specific factual allegation at trial. Without court-ordered sanctions with a real "bite", the pre-trial procedure for further and better particulars in criminal cases would not achieve the objective of promoting transparency and ensuring that parties are sufficiently aware of the cases they have to meet at trial and are able to adequately prepare for trial without being caught by surprise.

49 The corollary of the importance of such pre-trial court orders for particulars is that the system must cater for sufficient levels of checks to ensure the rectitude of the decisions made on such applications. In this connection, as regards pre-trial orders for particulars made by the District Courts, the well-established revisionary jurisdiction[81] of the High Court could be exercised, as was the case in *Li Weiming v Public*

(4) Any judgment, order or direction given or made against any party who does not appear before the Court when directed to do so under paragraph (1) may be set aside or varied by the Court on such terms as it thinks just.

80 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 169(2).

81 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ss 23 and 27.

*Prosecutor*.[82] For High Court cases, however, if the pre-trial application for particulars is to be disposed of by the registrars, an appeal procedure to the High Court judge ought to be available.[83] Although the right to pre-trial discovery and particulars is clearly of sufficient significance to require a degree of appellate control and revisionary oversight, one must, however, be wary of creating an unnecessarily elaborate procedure that could derail from the primary objective of determining the guilt or innocence of the accused at trial. As highlighted above, the risk of unnecessary satellite litigation must be guarded against, and an excessively layered interlocutory framework would be counter-productive. As such, there should only be a single level of appeal or application for revision, and there ought generally not to be further recourse to the Court of Appeal in relation to such pre-trial applications for particulars or discovery of documents.[84]

50 As would be evident by now, it is of crucial importance that the procedure for applications seeking further and better particulars be operative prior to the onset of trial, for otherwise the objective of criminal discovery would not be achievable in the first place. In this regard, to the extent that the earlier case of *Kulwant v Public Prosecutor*[85] stands for the proposition that applications for discovery can only be heard by the trial court, there must be no doubt that this principle cannot continue to apply. That said, although we know that such applications should thus be taken out prior to trial, the challenge is to determine precisely when before trial such relief should be available.

51 In this regard, it is instructive to first look at the position in respect of civil proceedings, for which there are clearly defined rules as to the timing of orders for the provision of particulars. Order 18 r 12 of the Rules of Court[86] prescribes that an order for particulars should generally not be made prior to service of the defence unless it is necessary or desirable to enable the defendant to plead or for some other special reason. The rationale for the general rule is that the defendant may otherwise use the process to delay the filing of his defence.[87] However, the provision of particulars before the defence can

82 [2013] 2 SLR 1227.

83 This would be akin to the Registrar's Appeal in respect of interlocutory applications in civil proceedings: see Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 56.

84 This would mirror the position for interlocutory appeals in civil cases. See recent amendments to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) effected via the Supreme Court of Judicature (Amendment) Act 2010 (Act 30 of 2010).

85 [1985–1986] SLR(R) 66.

86 Cap 322, R 5, 2006 Rev Ed.

87 *Singapore Court Practice* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) at para 18/12/10.

be granted by the court, and is desirable where the defendant would otherwise be prejudiced or embarrassed in his pleading.[88]

52 One would have thought that such principles should equally hold true in the criminal context. Some doubt on whether these same principles could apply in the criminal context is, however, cast by the decision in *Li Weiming v Public Prosecutor*,[89] specifically the court's statement that:[90]

> ... [t]o comply with their discovery obligations, the petitioners will have to speculate about what the Prosecution's case would be and craft a summary of their defence in line with this. In doing so, they may have little option but to reveal where they expect their criminal liability to lie, and thereby jeopardise their privilege against self-incrimination. The CCDC regime, which is intended to create greater transparency and parity between the Prosecution and the Defence, may therefore end up being applied in a way which works against the petitioners' interests.

53 It would appear from the general tenor of the court's ruling that the Defence would be entitled to further and better particulars of the Prosecution's case, *prior to* the filing of its Case for the Defence, and that this is *the general rule as opposed to the exception*. The root of the court's concern would appear to be that, if the charges and summary of fact were insufficiently particularised, the accused may be led to disclose more than he should in his Case for the Defence, thereby infringing his privilege against self-incrimination. If that is indeed the effect of the court's decision, the position in criminal proceedings would depart from that in civil proceedings to the extent that the Defence would be able to routinely apply for particulars even before stating their own case. As for the Prosecution, they would only be able to take out the application for particulars after the Case for the Defence has been served.

54 While the protection afforded to the accused person by the court in *Li Weiming v Public Prosecutor*[91] is to be welcomed, a number of practical concerns arise. First, it is possible for the Defence to use the application as a delay tactic and seek extensions of time to file the Case for the Defence on the pretext that there are insufficient particulars in the Case for the Prosecution, and this may lead to prolongation of the trial process and a waste of court time and resources.

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88 *Singapore Civil Procedure* vol 1 (GP Selvam ed) (Sweet & Maxwell, 2013) at para 18/12/57.

89 [2013] 2 SLR 1227.

90 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [49].

91 [2013] 2 SLR 1227.

55 Second and perhaps more fundamentally, there is a danger that any particulars obtained by the accused would be used to the tailor the Case for the Defence. The court in *Li Weiming v Public Prosecutor*[92] took the position that there was little danger of witnesses being suborned, but it is not clear that this would be the position in every case. Indeed, it could be argued that the risk of evidence being tailored is higher in criminal cases as the stakes tend to be higher. Further, unlike in civil proceedings where both parties to the action typically have personal knowledge of the material facts and evidence, in a criminal case, the Prosecution generally does not have first-hand knowledge of what actually happened. In such circumstances, it is far easier for the accused person to re-characterise or embellish without detection. It is thus submitted that the substantive test to be applied by the court must be carefully crafted to guard against these dangers.

56 Beginning first with the substantive test that is applied by a court in applications for further and better particulars in *civil* proceedings, an order for particulars is generally in the court's discretion and would be made to inform the other side of the case that they have to meet, to prevent the other side from being taken by surprise at trial and to enable the other side to know the case that they have to meet.[93] It is suggested that a similar approach be taken in respect of applications for further and better particulars in the *criminal* context, except that the test be made even more stringent in order to guard against the dangers highlighted above.[94] This can be achieved by additionally requiring that particulars be permitted only if such particulars are adjudged by the court to be *necessary* for the applying party to prepare for trial. This additional criterion of necessity, which is applicable to the discovery of documents[95] in civil proceedings but not for applications for further and better particulars, would filter out frivolous applications and act as a check and balance against inappropriate use of this procedural mechanism.

*(2) Application for specific discovery*

57 In respect of how the proposed application for specific discovery of documents should be made, the answer is no different from the earlier discussion in the context of applications for further and better particulars: such applications should also be made by way of motion supported by affidavit, for the same reasons as set out above.[96]

92 [2013] 2 SLR 1227 at [49].
93 *Batcha Ammal v Ponnachi* [1965] 2 MLJ 43; *Singapore Civil Procedure* vol I (GP Selvam ed) (Sweet & Maxwell, 2013) at para 18/12/2.
94 See paras 52–53 above.
95 See Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 24 r 7.
96 See para 44 above.

The arguments made above in considering the framework for applications for further and better particulars, namely the need for a dedicated forum with an expansion of the court's interlocutory powers, together with proportionate appellate oversight, apply equally to applications for specific discovery.

58 The issue of *when* the parties can take out the application for specific discovery is more complicated. A look at the established system of discovery applications in civil proceedings would again be a helpful starting point to set the stage for analysis. Discovery in civil cases can be broadly divided into two stages. First, O 24 r 1 of the Rules of Court[97] sets out the general discovery obligations of the parties. The rule prescribes that a party should give discovery of documents which have been in his possession, custody or power, and which are relevant to his case. General discovery would usually take place as a matter of course in civil proceedings, and the court is not involved in the process except to make orders as to timelines. Once general discovery has taken place, if the opposing party is of the view that the party providing the discovery has other documents beyond those disclosed, he may make an application for specific discovery under O 24 r 5.[98] An application for specific discovery can thus be seen as a second stage, where parties apply to court to obtain specific documents that were not disclosed during general discovery. Flowing from this, an application for specific discovery is, in the normal course of litigation, taken out after general discovery is completed.[99] As will be seen later, the test that the court applies in considering an application for specific discovery is wider than that in general discovery.

59 Transposing the two-stage discovery process to criminal proceedings, it is suggested that the requisite disclosures as set out in the CCD regime and *Kadar* discovery can be characterised as general discovery as these are the documents that the parties would be entitled to and have to furnish to the opposing side in accordance with the criteria and timelines prescribed by the law. Under the CCD regime, this would be two weeks after the first CCDC in respect of statements made by the accused which the Prosecution intends to adduce in evidence for matters heard in the Subordinate Courts,[100] and two weeks after the Case for the Defence is served for other statements and exhibits.[101] As for *Kadar* discovery, the Court of Appeal stated in the first *Kadar*

97 Cap 322, R 5, 2006 Rev Ed.

98 See, generally, *Singapore Civil Procedure* vol I (GP Selvam ed) (Sweet & Maxwell, 2013) at para 24/5/1.

99 It should be noted, however, that O 24 r 5 specifically states that the court can make an order for specific discovery "at any time". This would mean that such an order can be made even before general discovery.

100 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 161.

101 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 166.

judgment[102] that the unused material should be disclosed no later than seven days before the date fixed for the committal hearing in the High Court or two weeks from the CDC for Subordinate Court trials.

60 The disclosure timelines stipulated in the first *Kadar* judgment produce the rather odd result that the Defence would obtain the unused material first, at the same time as the Case for the Prosecution, and obtain the documentary evidence that would actually be used at trial only two weeks after service of the Case for the Defence.

61 In devising the appropriate framework, one may argue that to give full effect to the parties' rights to discovery, especially the right of the accused to relevant documentary evidence as early as possible to adequately prepare for his or her defence, there should be no limits placed on the timing of the specific discovery applications. Although intuitively attractive, this argument fails to take into account the point made earlier that any right to discovery is a qualified one, and specifically that the accused's right to all the available evidence against him in a timely manner must be counter-balanced against the Prosecution's interest in effectiveness and efficiency of prosecution, as well as broader policy considerations of efficacy in court proceedings and proportionate use of resources. Such policy considerations apply similarly to criminal proceedings, albeit perhaps to a somewhat lesser degree. This should not, however, change the point of principle, which is that, as a general rule, applications for specific discovery in criminal proceedings, like its civil counterpart, should generally be taken out only after general discovery (that is, discovery as prescribed under the existing applicable legal provisions on the CCD regime and under *Kadar* discovery) is completed. This is so that court time and resources will not be wasted dealing with interlocutory applications seeking specific discovery of documents that would be disclosed under general discovery in any event. Further, this approach would go towards reducing the number of applications, as parties would first be able to review the documents that they have received from the other side and then make an informed decision as to whether they think the opposing party still has documents that have not been disclosed. This would ensure that parties are not bogged down anticipating the documents that the opposing party might have, and are not distracted by litigating unnecessary interlocutory applications. Hence, in this sense, such sequential applications for specific discovery only after the phase of general discovery would also be conducive in giving better practical effect to the parties' rights to discovery without unnecessarily compromising their adequate preparations for the actual trial.

102 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].

62 Moreover, the general position of permitting specific discovery applications only after the process of general discovery is consistent with the legislative intent behind the sequential nature of discovery under the CCD regime in the first place. In elaborating on the criminal disclosure regime, the Minister for Law said:[103]

> *The framework has a number of safeguards to try and prevent abuse. The sequential nature of the process protects the interests of prosecution and defence. The onus is on the prosecution to set out its case first, with the accused's statements that it is relying upon. The provision of all statements after the defence case is filed cuts down on opportunities to tailor evidence.* [emphasis added]

In a similar vein, the possibility of obtaining documentary evidence prior to the first round of general discovery heightens the risk that parties may obtain evidence at an excessively early stage such that they can make use of these to tailor their own cases and evidence.

63 If this approach, of generally allowing specific discovery applications only after general discovery, is adopted, then the application for specific discovery for unused material can only take place after the unused material has been served in accordance with the timelines set out in the first *Kadar* judgment. Applications for specific discovery relating to material covered by the CCD regime, on the other hand, can only be taken out after the Case for the Defence is served (in respect of applications by the Prosecution) or after the Prosecution has served the requisite documents in accordance with the CCD regime (in respect of application by the Defence). While it is acknowledged that this scheme may give rise to some untidy asymmetry in terms of timings of disclosure, it is suggested that for the reasons set out above,[104] this is still preferable to allowing the parties to make the application before general discovery.

64 The above approach, of course, only constitutes the general rule. Like in civil proceedings, there would be instances where a request for discovery of certain specific documents can and should legitimately be made and acceded to, prior to general discovery.[105] The recent High Court decision of *Goldring Timothy Nicholas v Public Prosecutor* ("*Profitable Plots* case")[106] provides an interesting and important illustration of this. The applicants in that case filed an application to compel the Prosecution to disclose certain documents that were seized from *the applicants* by the law enforcement authorities in the process of

103 *Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 414 (K Shanmugam, Minister for Law).

104 See paras 59–60 above.

105 See n 101 above.

106 [2013] SGHC 88.

investigations. Crucially, these were documents belonging to the applicants themselves. The Prosecution's resistance was not in relation to the disclosure *per se*, but the timing of it. In fact, these were documents which the Prosecution wanted to rely on at trial, and hence were documents which the Prosecution would have been required to disclose eventually in any event. The crux of the case was that the applicants wanted the documents earlier, prior to the statutorily prescribed time period which is after the filing of the Defence's Case.

65 In holding that the applicant's common law right of access to the documents seized from them was not excluded or restricted by the statutory CCD regime, V K Rajah JA considered the Parliamentary intent behind the sequential process of discovery, specifically how this "was intentionally designed to avoid a situation where an accused person was given information before he had put his defence on record thereby enabling him to tailor his evidence to fit that facts".[107] Observing astutely that there can be no conceptual basis to say that granting the accused access to documents originally in his possession could allow him to tailor his evidence, V K Rajah JA reached the conclusion that the applicants should therefore be entitled to discovery of these documents ahead of the prescribed statutory timeline. The holding in the *Profitable Plots* case is not only illuminating in the narrow context of seized documents; more broadly, it rightly signifies that the legislative intent must be keenly borne in mind in addressing the issue of timing of disclosures under the CCD regime. While the rules on sequential discovery process must generally be adhered to (and it has been argued that specific discovery applications should generally follow general discovery), these are not inflexible rules to be applied mechanically. Disclosure could come in advance of the statutorily stipulated time frames in exceptional cases as long as the potential mischief behind sequential disclosure (most significantly that of preventing the tailoring of evidence) is addressed.

66 Before leaving the issue of timing of disclosures, a further question is whether giving effect to the parties' right to discovery extends to a right to obtain documentary evidence prior to the commencement of criminal proceedings. Under the Rules of Court,[108] parties in civil proceedings are in certain circumstances permitted to make applications for pre-action discovery.[109] In criminal cases, having the equivalent of such a pre-action regime would translate to applications for discovery prior to the charging of the accused in court. This is an area, however, where the position in criminal discovery would have to diverge from that in the civil context, because of the very

107 *Goldring Timothy Nicholas v Public Prosecutor* [2013] SGHC 88 at [57].
108 Cap 322, R 5, 2006 Rev Ed.
109 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 24 r 6(1).

different considerations at play. Whereas the purpose of pre-action discovery in civil cases is to allow a potential defendant without sufficient facts for commencing proceedings to be equipped to frame a cause of action,[110] there are sound policy reasons why these considerations do not and should not apply to criminal proceedings.

67 Practically, any application for pre-trial discovery in criminal proceedings would be during the stage of police investigations. The Prosecution should not be allowed to take out an application for pre-action discovery as the decision to charge should be based solely on the evidence obtained by the investigating agencies. Unlike in civil cases, the courts ought not to come to the assistance of the Prosecution even before the latter has decided whether or not to utilise the court system, for otherwise it would skew the already existing informational and tactical imbalance further in favour of the Prosecution at the detriment of the rights and interests of the suspected offender. Further, the privilege against self-incrimination must certainly dictate that a potential accused person should not be made to assist in the investigation against himself. On the other hand, the Defence should not be permitted to take out an application for pre-trial discovery in order to obtain documents in the Prosecution's possession, as it is crucial to maintain the confidentiality of police investigations prior to the decision to charge. The public interest in effective investigations means that the architecture of the discovery framework cannot extend to the period prior to formal court proceedings being taken against the accused.

68 It will be apparent that the imperative of striking this balance between the accused's rights and the public interest in effective prosecution has been the constant philosophy underpinning the discourse thus far in constructing the appropriate procedural framework to give effect to the rights to discovery in criminal proceedings. This conceptual underpinning is equally applicable, and probably even more important, in considering the test for *what* material should be disclosed.

69 Under the CCD regime, the statutory provisions make it clear that the documents to be disclosed are those that the Prosecution and the Defence intend to admit at trial. Beyond that, there is no guidance in legislation or case law on the test for discoverable documents under the CCD regime. In comparison, there are well-defined rules on what documents should be disclosed in civil cases. For general discovery, O 24 r 1(2) of the Rules of Court[111] describes the documents to be provided as follows:

110 *Ching Mun Fong v Standard Chartered Bank* [2012] 4 SLR 185.
111 Cap 322, R 5, 2006 Rev Ed.

(*a*) *the documents on which the party relies or will rely; and*

(*b*) the documents which could –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

70 As can be seen, the test for what should be disclosed under O 24 r 1 is closely tied to the effect that the document would have on either party's case, and a party has to disclose all documents within his possession, custody or power that fall within this criteria of relevance. The test for specific discovery under O 24 r 5 is broader, with the concept of discoverable documents extended to encompass not just documents relevant in and of themselves, but also documents that would lead the applicant on a "train of inquiry" to documents that may be relevant in the sense as described in O 24 r 5(3)(*b*).[112] Crucially, the tests for both general and specific discovery are further qualified by the threshold of necessity: the documents, even if relevant, would not have to be disclosed unless such documents are *necessary* for the fair disposal of the case or for saving costs.[113]

71 It should be readily apparent that the documents to be disclosed pursuant to the statutory CCD regime effectively correspond to the first limb of the civil test of discovery, that is documentary evidence that either party intends to rely on at trial. Other discoverable documents outside this category in criminal proceedings would seem to fall under the notion of "unused materials" as explained in the *Kadar* judgments. To recap, the court stated that the Prosecution's duty to disclose extends to:[114]

> (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and
>
> (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

72 The court further made it clear that the documents to be disclosed would not include material which is neutral or adverse to the

112 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 24 r 5.

113 Discovery under O 24 rr 1 and 5 is subject to O 24 r 7 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) which prescribes the requirement of necessity.

114 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].

accused, but only covers material that tends to undermine the Prosecution's case or strengthen the Defence's case.

73 It seems, therefore, that there are two touchstones to the test of discoverable unused materials as articulated in the *Kadar* judgments: first, that of likely admissibility, and second, the requirement of credibility and relevance to the guilt or innocence of the accused. Taking the second requirement first, a parallel can be drawn between it and the test of relevance for civil discovery. The tests are similar, in that both relate to the relevance the documents bears to the eventual substantive outcome of the case. There are, however, some key differences. For criminal discovery of unused materials, there is a further requirement that the documents in question be credible. In addition, the criminal test is further qualified by the concept of reasonableness, that is, unlike in civil cases, the scope does not cover all documents that *may* affect the cases, but is more narrowly circumscribed to those documents that might *reasonably* be regarded as being so credible or relevant. It is submitted that such differences are justifiable, and rightly reflect the underlying tension between giving the accused access to sufficient documents in preparation of his defence and the interest of effective prosecution. As highlighted above, the right of the accused to discovery is a qualified one, and the Prosecution ought not to be under a burden to constantly review all the documents in its possession and disclose any documents that *may* potentially be relevant in terms of affecting the parties' respective cases. Neither should it be compelled to do so upon an application from the Defence. Thus conceived, the requirements of credibility and reasonableness that are built into the framework of *Kadar* discovery function as proper checks to ensure the balance is struck between the interests of the accused in adequate disclosure and the Prosecution's interest in not being overwhelmed by an excessively onerous document review and voluminous disclosure exercise.

74 It is less clear, however, why there is also the requirement that the documents in question be likely to be admissible. If this refers to the technical sense of legal admissibility of evidence at trial, one may query why there is a need for the Prosecution to review the issue of admissibility, or indeed whether it would even be in a position to do so in practice. It must be borne in mind that the Prosecution's duty to disclose unused material must be discharged at a very early stage in the proceedings. At this stage, it is not a straightforward exercise for the Prosecution to be able to identify documents which are likely to be admissible, let alone those which would lead to a line of inquiry that would lead to material that is likely to be admissible. Admissibility under the Evidence Act,[115] as opposed to mere relevance (which is very much a matter of fact), is a technical and complex concept that is not

115 Cap 97, 1997 Rev Ed.

easy to decipher, much less predict.[116] One would have thought that focusing on documentary evidence that is relevant to the Prosecution's case as contained in the charges and summary of facts, and which are of credibility, would suffice as the criteria for discoverable unused materials.[117]

75 The challenge for the Prosecution in seeking to discharge its continuing duty of disclosure, however, does not stop with the difficulty in determining admissibility of evidence. The scope of discoverable documents under *Kadar* discovery extends even to documents that are non-admissible but which would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to documents that are admissible and which are reasonably credible and relevant. To the civil practitioner, this "line of inquiry" test is clearly reminiscent of the "train of inquiry" test in *Peruvian Guano*.[118] Crucially, this wider "train of inquiry" test only applies to applications for specific discovery under O 24 r 5 of the Rules of Court.[119] Yet under the formulation of the test in *Kadar* discovery, the Prosecution's duty to disclose (and correspondingly the Defence's right to discovery) mandates a continuous process of document review by the Prosecution throughout the course of proceedings to identify any of such documents which can be said to fall under this extremely broad category of documents. This, it is submitted, shifts the balance too far in favour of the accused. The better approach is for the wider "line of inquiry" test to apply only to instances of specific discovery, that is, upon an actual application taken out by the Defence. This would obviate the need for the Prosecution to speculate as to the documents that may fall under the broad scope of the "line of inquiry" test, and put the onus rightly on the Defence to identify specific documents or classes of documents that they think are lacking. It should only be upon the Defence being able to show some basis for their application for specific discovery that the burden shifts to the Prosecution to provide such documents, or to resist disclosure on the grounds that the "line of inquiry" criterion is not satisfied. To take it further, it may be argued that when the court is faced with such an application for specific discovery, there should be an additional criterion of *necessity*, to ensure that orders for specific discovery of such "line of inquiry" documents are granted only where the eventual documents

116 For a discussion on admissibility under the Evidence Act (Cap 97, 1997 Rev Ed) in relation to the *Kadar* judgments, see Chen Siyuan, "The Prosecution's Duty of Disclosure in Singapore" (2012) 11(2) *Oxford University Commonwealth Law Journal* 207 at 213.

117 For a related discussion, see Chen Siyuan & Nicholas Poon, "Reliability and Relevance as the Touchstones for Admissibility of Evidence in Criminal Proceedings" (2012) 24 SAcLJ 535.

118 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

119 Cap 322, R 5, 2006 Rev Ed.

that could be obtained at the end of this "line of inquiry" are necessary for the accused person to prepare for trial.

76 Whereas the Defence has a right to compel the Prosecution to produce documents falling under the ambit of discoverable unused materials as defined under *Kadar* discovery, the *Kadar* judgments make it clear that there is no similar obligation on the Defence to disclose such unused materials, because Defence counsel "are not obliged to pro-actively disclose evidence of their client's guilt" as such disclosures would typically be protected by legal professional privilege and would run counter to the presumption of innocence.[120] In other words, the substantive test laid down in the *Kadar* judgments as to what are discoverable unused materials only applies to required disclosures by the Prosecution but not the accused. Indeed, it has been argued above that the asymmetry in terms of the rights to discovery of the accused as compared to the Prosecution is justifiable as a matter of policy because of the underlying precepts of our criminal justice system, and that their obligations to disclosure are correspondingly not evenly weighted. Having said that, it would surely be going too far to contend that the Prosecution has no right to discovery at all, not least because the legislature itself clearly recognises such a right on the part of the Prosecution, at any rate in relation to documents that the Defence intends to adduce at trial. That being the case, it must surely follow that any pre-trial procedure for specific discovery must also be available to the Prosecution, albeit the substantive tests for what are discoverable documents may be different depending on whether the applicant is the accused or the Prosecution. Further thought would have to be put into the type of circumstances in which the Prosecution may be entitled to specific discovery of documents. That exercise goes beyond the scope of this article, but it would suffice to say that it is not inconceivable that the Prosecution may in an appropriate case be able to obtain such specific discovery, for instance, by showing the court that the Defence is evidently withholding the disclosure of certain key documentary evidence which the Defence would definitely seek to admit at trial because these pieces of evidence are critical to proving a primary ingredient of the Defence's case. It should be further borne in mind that in the event of specific discovery requests by the Prosecution, it would always remain open to the Defence to claim privilege as a basis to resist disclosure.

## V. Conclusion

77 *Kadar* discovery, in a sense, represents the starting point in criminal discovery. As the court in that case itself recognises, "[t]here is

120 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [108].

still ample scope for the development of the fine details in subsequent cases or by legislative intervention".[121] The above discussion has been an attempt to inject a certain degree of organisation and structure to this evolving and still fluid area of law, primarily by borrowing from the established framework of civil discovery procedures.

78 Undergirding this scheme is the central idea that both the Defence and Prosecution have rights to discovery which have to be properly balanced against a backdrop of broader policy considerations unique to the criminal justice process. The tentative suggestions offered in this article as to the scope of discovery and its mode and timing of application are untested and would certainly require refinement through further judicial exposition or legislative developments in this emerging and important area of criminal discovery.

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121 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].